

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Craig Ross and Natalie Operstein,

Petitioners

v.

The Board of Trustees of California State University,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can an earlier-commenced *Title VII* case against the State of California, initiated with a request for a preliminary injunction during the pendency of the EEOC investigation, be foreclosed as duplicative of a later-commenced *42 USC §1981 / 42 USC §1983* case against State officials in their individual capacities?

PETITION FOR A WRIT OF CERTIORARI

Craig Ross and Natalie Operstein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

PARTIES TO THE PROCEEDINGS

Petitioners Craig Ross and Natalie Operstein (“Petitioners”) were plaintiffs and appellants in the underlying proceedings.

Respondent Board of Trustees of California State University (“CSU”) was defendant and appellee in the underlying proceedings.

OPINIONS BELOW

The decision of the court of appeals was reported as 741 Fed. Appx. 442 | 2018 U.S. App. LEXIS 30558 | 2018 WL 5371766 (App. 2). Unreported are the district court’s order (App. 4) and court of appeals’ denial of rehearing (App. 6).

JURISDICTION

The court of appeals entered its judgment on October 29, 2018 (App. 2), and denied a petition for rehearing en banc on 22 March 2019 (App. 6). This Court has jurisdiction under *28 U.S.C. § 1254(1)*.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

STATEMENT OF THE CASE

On 31 May 2016, Petitioners initiated a *Title VII* proceeding with a request for temporary injunction to prevent respondent Board of Trustees of California State University, which is the State of California acting in its higher education capacity, from termination of Dr. Operstein's employment pending EEOC investigation and *Title VII* proceedings. The injunction was denied and the case was administratively closed by the Clerk. Petitioners appealed.

On 11 May 2017, Petitioners' *Title VII* complaint was received but not filed by the Clerk of the District Court on the ground of administrative closure of the case.

On 12 May 2017, with their appeal still pending, Petitioners filed a motion in the Court of Appeals for the Ninth Circuit for leave to reopen the underlying district court case and file the *Title VII* complaint. The Court of Appeals summarily denied the motion as moot on 16 May 2017, and issued the mandate on 24 May 2017.

On 2 June 2017, Petitioners filed a motion in the district court with a request to reopen the *Title VII* case and file the *Title VII* complaint with the filing date of 11 May 2017, the date their *Title VII* complaint was received by the Court. On 2 June 2017, Petitioners also filed a *42 USC §1981 / 42 USC §1983* case against state officials in their individual capacities for damages resulting from Dr. Operstein's termination in 2016. The motion to reopen the *Title VII* case and file the *Title VII* complaint was denied by the District Court as moot on the ground that Petitioners already received relief from filing a

complaint in the *42 USC §1981 / 42 USC §1983* case (App. 4).

Petitioners appealed. On 29 October 2018, the Court of Appeals affirmed the distinct court's orders (App. 2). Petitioners' timely motion for rehearing en banc was denied on 22 March 2019 (App. 6).

The Court of Appeals had jurisdiction pursuant to *28 USC §1291*.

ARGUMENT

A *Title VII* action can be initiated with a statutory *Title VII* injunction to avoid "pointless exercise in formalism" and to prevent impeding a *Title VII* claimant from obtaining a judicial hearing on the merits. *Duke v. Langdon*, 695 F.2d 1136 (9th Cir. 1983). In *Berg v. Richmond Unified School District*, 528 F.2d 1208, 1211 (9th Cir. 1975), the Court of Appeals held that the case was initiated during the pendency of the EEOC investigation, no new action under *Title VII* needs to be commenced after receipt of the EEOC right-to-sue notice.

A *Title VII* proceeding commenced in May 2016 cannot be precluded as duplicative of a later-filed action commenced in June 2017. The cases pertaining to dismissal of duplicative actions all involve dismissal of a later-filed action, not of an earlier-filed action (e.g. *United States v. The Haytian Republic*, 154 U.S. 118 (1894)).

There can be no duplication in cases against different defendants. *Ibid.* There is no duplication in cases with different causes of action. *Ibid.* at 128.

There is no duplication in an earlier action against the employer-state under *Title VII* and a later action against state agents under *42 USC*

~~§1983~~ and ~~1986~~; the state is immune from damages under *42 USC §1983*, asserted against state officials in the later-filed action. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

While the Eleventh Amendment and sovereign immunity affects the monetary damages against the State in *42 USC §1983* cases (*Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989)), it does not shield the defendant State from liability for monetary damages in *Title VII* cases. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992). Monetary damages asserted against the State in the *Title VII* case cannot be asserted against the State in the *42 USC §1981/1983* proceedings. *Kentucky v. Graham*, 473 U.S. 159, 168-170 (1985) ["Respondents cannot seek damages from the Commonwealth simply by suing Commonwealth officials in their official capacity"].

Title VII and *42 USC §1981* proceedings are not mutually exclusive: "[T]he remedies available to the individual under *Title VII* are co-extensive with the individ[ua]l's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other, and are not mutually exclusive." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). "Section 1981 is not coextensive in its coverage with *Title VII*. [...] Also, *Title VII* offers assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees, items that are unavailable at least under the specific terms of §1981." *Ibid.* at 460. Also, the alleged discrimination by national origin is treated differently under the *Title VII* and *42 USC §1981* (e.g., *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Justice Brennan, concurring)).

Petitioners' *Title VII* action, commenced in May 2016, and their *42 USC §1981/1983* action, commenced in June 2017 are subject to different statutes of limitation, and relief under the earlier-commenced *Title VII* action may not be available under the later-commenced *42 USC §1981/1983* action. *Johnson v. Railway Express Agency, nc.*, 421 U.S. 454, 457-467 (1975) ["an action under § 1981 [...] time-barred by the [...] limitation period imposed by applicable state law notwithstanding the fact that petitioner had filed the *Title VII* charge before that limitation period had expired"].

The doctrine of qualified immunity protects government officials from liability for civil damages (*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) and might shield individual defendants sued in personal capacity in the later-commenced *42 USC §1983* action from liability for monetary damages; the doctrine does not shield the defendant State from liability for monetary damages in the foreclosed *Title VII* action.

REASONS FOR GRANTING THE PETITION

The Court of Appeals has decided an important federal question of whether an earlier-commenced *Title VII* action against the State is precluded as duplicative by a later-commenced *42 USC §1981/1983* action against State officials in a way that conflicts with prior decisions of this Court. ("Because the judgment below was inconsistent with the rulings of other Courts of Appeals and involves an important issue, we granted the petition for certiorari." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

Application of these decisions to the common situation where the *Title VII* proceedings are commenced with a request for a preliminary injunction during EEOC's investigation of the claim present an important question of federal law that has not been, but should be, settled by this Court.

The question presented for review is important, simple, clear, and will take little judicial time to address while having an important impact on the protection of civil rights under *Title VII*, *42 USC §1981*, and *42 USC §1983* deprived by the erroneous appellate decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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18 June 2019